IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17851 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.N.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MONGHIBEN VASTUBHAI VALA

Versus

MADHUBHAI BHIKHABHAI DHADHAL

Appearance:

MR PJ KANABAR for the Petitioners.

MR RM CHHAYA for the Respondent.

CORAM : HON'BLE MR.JUSTICE D.N.PATEL

Date of decision: 04/08/2004

ORAL JUDGEMENT

Rule. Learned counsel Mr. R.M.Chhaya waives service of notice for the respondent. At the request of the learned counsel for the parties, this petition is heard finally.

2. This petition has been preferred under Article 227 of the Constitution of India, whereby the petitioners are challenging the judgment dated 1st August, 2003 in Civil Miscellaneous Appeal No. 82 of 2002 passed by the Joint District Judge, 1st Fast Track Court, Amreli, whereby the order dated 3rd October, 2002 below injunction application exh. 5 in Regular Civil Suit no. 73 of 2002 passed by the learned Civil Judge (J.D.), Dhari, has been set aside.

3. The petitioners are the original defendants in Regular Civil Suit no. 73 of 2002. The learned counsel for the petitioners submitted that the respondent (original plaintiff) preferred a suit bearing Regular Civil Suit no. 73 of 2002 for a declaration and permanent injunction against the petitioners. Alongwith the suit, injunction application exh. 5 was also preferred by the respondent and the same was dismissed with costs by the learned Civil Judge (J.D.), Dhari vide order dated 3rd October, 2002. The respondent therefore, preferred Civil Miscellaneous Appeal No. 82 of 2002 before the learned Joint District Judge, 1st Fast Track Court, Amreli and the lower appellate court set aside the order passed by the trial court. The learned counsel for the petitioner submitted that the lower appellate court has not properly appreciated the fact that in the document which is the sale deed of the disputed property dated 3rd May, 1971 which is produced at mark 3/1, the right of way as claimed by the respondent was never in existence. This aspect of the matter has not been appreciated by the lower appellate court. Subsequent documents for the same property which are produced at marks 3/2 and 3/3 reflect incorrect right of way from the field of the petitioners. In fact, the map prepared by the office of the District Inspector of Land Records (DILR) was also presented before the lower appellate court vide mark 13/1. The said map also reflects the way after the boundaries of survey no. 167 which is owned and possessed by the present petitioners and therefore, the contentions of the original plaintiff that the plaintiff is having a right to way to enter into his field bearing survey no. 167 (admeasuring 4 acres) from the southern parts of the same survey number which is owned and possessed by the petitioner, is not correct. In fact, from the map presented at marks 13/1 and 14/1, it is reflected that outside the southern boundary of survey no. 167, there is a road which should be utilised by the original plaintiff. In fact, there is no road within survey no. 167 especially within the southern boundary of survey no.167. Looking to the map prepared by the DILR, there is a road outside the southern

boundary of survey no.167. This aspect of the matter has not been appreciated at all by the lower appellate court and hence, the judgment passed by the lower appellate court is liable to be quashed and set aside. It was vehemently contended by the learned counsel for the petitioners that the panchnama drawn by the Court Commissioner at mark 14/2, makes it abundantly clear that there is no road in existence within the boundary of survey no.167 especially the southern side thereof. On the contrary, the said panchnama at mark 14/2 reflects that outside the southern boundary of survey no. 167, there is a road. If the said panchnama is looked closely, it reflects, how an attempt was made by the original plaintiff to make a show of existence of a road. It is narrated in the panchnama that recently some one has plied a cart or other vehicle on existing crop and therefore, a road-like marks are in existence which look apparently brand new. If there is already an existing old road, there must be older marks of wheels of carts etc. But whatever the road-like marks observed within the boundary of survey no. 167, especially at the southern side thereof, were totally new and the same are apparent and ostensible. If we accurately read the panchnama mark 14/2, which was available even with the trial court, it reflects that outside the southern boundary of survey no. 167, there are older marks of wheels of cart etc. which reflects that there must be existence of road for village vehicles, carts, tractors etc. Thus, whatever road-like marks are found within the boundary of survey no. 167, especially southern side thereof, are totally new as if the same have been created only for preparing the panchnama. This aspect of the matter has also not been properly appreciated by the lower appellate court and, therefore, there exists grave error which is apparent on the face of the record, has been committed by the lower appellate court, and wrongly the lower appellate court has set aside the order passed by the trial court which was decided in favour of the present petitioners (original defendants).

4. It is vehemently submitted by the learned counsel for the respondent that the respondent has purchased part of survey no. 167 admeasuring 4 acres from his predecessor-in-title Gangdas Nagji, by a registered sale deed dated 30th July, 2002 wherein a clear cut right of way has been reflected The said way is shown within the boundary of survey no.167 at the southern side thereof which is in possession of the petitioners, and, therefore, the judgment passed by the lower appellate court is true and correct. There is already an existence of an old way which the

respondent-original plaintiff and his predecessors-in-title were using. The said way or road is within the boundary of survey no.167 especially southern side thereof and, therefore, the order passed by the trial court was not true and correct and hence rightly the same has been set aside by the lower appellate court. In view of this, there is no substance in this petition and it deserves to be dismissed.

5. I have perused the case papers, orders passed by the courts below, as well as affidavit and the documents referred to therein. Looking to the facts and circumstances of the case, and especially the documents produced at marks 3/1, 14/2 (Panchnama) and 14/4, a map prepared by the Court Commissioner and the map prepared by the DILR (which are produced at marks 13/1 and 14/1 before the lower appellate court), I am of the clear opinion that there is an error in the order passed by the lower appellate court, which is apparent on the face of the record. The lower appellate court has not caught, what is prima facie reflected by the aforesaid documents. The panchnama and the maps prepared by the Court Commissioner vide marks 14/2 and 14/4 respectively as well as marks 13/1 and 14/1 (produced before lower appellate court) are in consonance with each other and all the aforesaid documents make it abundantly clear that there is an old existing way outside the southern boundary of survey no.167. This aspect of the matter has not been properly appreciated by the lower appellate court. Thus, this petition deserves to be allowed and the judgment passed by the lower appellate court is liable to be quashed and set aside and is hereby quashed and set aside.

As the Regular Civil Suit no. 73 of 2002 is already pending before the court of the learned Civil Judge (J.D.), Dhari, it is not necessary for this Court to go into fine nicety of of facts and appreciation of evidence, but suffice it to say that prima facie, on the basis of documents at marks 14/2, 14/4 as well as at marks 13/1 and 14/1 (documents produced before lower appellate court), there is an old road or way, outside the southern boundary of survey no.167. This is clear even from the map of the District Inspector of Land Records. (DILR.)

6. In view of the above discussion, this petition is allowed. The judgment dated 1st August, 2003 in Civil Miscellaneous Appeal No. 82 of 2002 passed by the learned Joint District Judge, 1st Fast Track Court, Amreli is hereby quashed and set aside and the order

dated 3rd October, 2002 below injunction application exh. 5 in Regular Civil Suit no. 73 of 2002 passed by the learned Civil Judge (J.D.), Dhari is hereby restored. Looking to the facts and circumstances of the case, the learned Civil Judge (J.D.), Dhari is hereby directed to dispose of Regular Civil Suit no. 73 of 2003 as early as possible and practicable and preferably within a period of 10 months from the date of receipt of writ from this Court. Rule made absolute accordingly with no order as to costs.

(D.N.Patel,J)

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